United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original

77-7145

To be argued by
ROSEMARY CARROLL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ, and FELIX E. SANTOS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-against-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALPHONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Plaintiffs-Appellees,

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CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALPHONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York, and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLANTS' BRIEF

Preliminary Statement

The defendants appeal from an order of the United States District Court for the Southern District of New York (CARTER, J.), entered on March 29, 1977, which declared competitive civil service examinations for police officer, prepared and administered during 1968-70, and a height requirement of 5'7" violative of Title VII of the Civil

Rights Act of 1964 and enjoined the hiring or firing of any police officers until the seniority of laid off minority officers is adjusted to correspond to the median appointment date for prior examinations taken by each member of the class or the actual date of appointment, whichever is earlier.

Defendants do not appeal from that part of the decision of the District Court which held that use of the examinations did not constitute discrimination under Washington v. Davis, 426 U.S. 229 (1976).

Defendants immediately moved in opposition to the preliminary injunction and for dismissal of the complaint on statute of limitations, laches and Title VII jurisdictional grounds. This motion was summarily denied by the District Court, without opinion.

The hearing held in the District Court on the application for preliminary injunction was limited by the Court to the issue of liability. Following the Court's decision of March 17, 1977, the Court held conferences on March 21 and 23 with the parties to review methods for compiling a list of plaintiffs to receive adjusted seniority dates reflecting median appointment dates. Defendants objected to such conferences on the ground that a hearing on relief was required. Instead on March 28, 1977, the District Court held a "hearing" limited to evidence of defendants' cooperation

accumulating data for the relief plaintiffs requested. The Court would not entertain testimony on the underlying issue of the propriety of that relief, its impact on the Police Department morale and operations and the views of the affected police officers. The defendants' request for hearings similiar to the hearing ordered in Acha v. Beame, 531 F. 2d 648 (2d Cir., 1976), was summarily denied by the District Court without opinion.

An application for a stay was granted by this Court on April 1, 1977.

Questions Presented

In March 1972, plaintiffs commenced a civil rights action under 42 U.S.C. §§1981 and 1983, challenging examinations given in 1968-1970 for police officer in New York City. The District Court denied a preliminary injunction. This Court affirmed the denial of the injunction. The case was then abandoned by the plaintiffs. In June 1975, the Police Department began layoffs pursuant to a last-hired first-fired seniority system. The instant action was commenced pursuant to Title VII of the Civil Rights Act. After a hearing, the District Court issued a preliminary injunction. It found that the plaintiffs had not established discriminatory intent but had established discriminatory effect which, it stated, was all that was necessary

under Title VII. The following questions are presented:

1. In view of Franks v. Bowman, 424 U.S. 747 (1976), which held that in a Title VII action challenging a plant-wide seniority system, the cause of action accrues at the time of the hiring not when the employees are fired, have the plaintiffs in the instant case, in challenging examinations given in 1968-1970, over two years prior to the date Title VII was made applicable to municipal corporations, stated a cause of action under Title VII and, to overcome the exception contained in Sec. 703(h) of Title VII with respect to a bona fide seniority system, should plaintiffs be required to demonstrate that the system results in a perpetuation of past intentional discrimination on the part of defendants?

2. Assuming, arguendo, that the plaintiffs have stated a cause of action under Title VII, is the cause of action barred by the statute of limitations or laches?

3. Where the plaintiffs have not established intentional discrimination within the requirements of Washington v. Davis, 426 U.S. 229 (1976), is it sufficient under Title VII to establish a cause of action by proving that the pre-1972 challenged actions had a discriminatory effect?

4. Where the defendants establish that during the post-freeze (1970-73) hiring period a greater percentage of minority applicants were selected for employment in the police force than the percentage of minority males in

the relevant labor force, have the plaintiffs established prima facie discrimination sufficient to shift the burden of proof on the issue of job-relatedness to defendants as is required of this Court's decision in Equal Employment Opportunity Commission v. Local 14 et al., Dkts. 76-6150, 6166 slip. op. p. 2481?

5. Was the determination of the District Court that the challenged examinations did not meet the standards for content validation under Title VII clearly erroneous?

6. Was the order of the District Court directing relief in the form of re-ordered seniority lists without a hearing and without agreement as to the use of constructive dates proper in light of this Court's ruling in Equal Employment Opportunity Commission v. Local 14 et al., supra?

Facts

Procedural Aspect of the Case

In March 1972, plaintiffs brought an action under 42 U.S.C. §§1981, 1983 challenging examinations for police officer given in 1968-1970. The complaint sought to suspend hiring and to set aside resulting date-of-hire seniority until seniority dates reflecting median appointment dates were established for plaintiffs' class. Guardians Association of the New York City Police Department v. Civil Service Commission, 72 CIV. 1278 (S.D.N.Y., 1973), aff'd 490 F 2d 400 (2nd Cir. 1973) (hereafter Guardians I). As

in the instant action, plaintiffs in Guardians I alleged that minorities fared worse than non-minorities on competitive civil service examinations for police officer which examinations were discriminatory and non job-related. During the pendency of Guardians I, on January 29, 1973, the Police Department began to hire police officers after a three year hiring freeze. In July 1973, plaintiffs' motion for a preliminary injunction was denied by the District Court. (A88a).*

In November 1973 this Court upheld the District Court's denial of injunctive relief finding that the eligible lists for police officer would be exhausted and all eligibles including plaintiffs class would be appointed. (DKT 73-2083) While noting that the action was not dismissed. this Court recognized the greater practicality of prospective cooperation between the parties to develop new professionally acceptable examinations for police officer (ibid.) Plaintiffs and defendants consulted on the preparation of the next police officer examination, No. 3014, which examination is not challenged here. The plaintiffs then abandoned Guardians I and took no steps there to reconstruct the seniority dates for members of the class who accepted appointment to the Police Department following the freeze.

*Numbers preceded by the letter A refer to the Joint Appendix. All other references are to the original papers.

In June 1975, the Police Department began lay-offs of officers based upon date of hire seniority that is, last-hired, first-fired. In March 1976, plaintiffs' counsel in Guardian I moved to compel discovery in that action. Defendants opposed the motion and the District Court advised plaintiffs that the action was closed. (A64a2).

On May 2, 1976, plaintiffs in the instant case, moved by order to show cause for a preliminary injunction against hiring or firing of police officers on the ground that seniority dates resulted from discriminatory examinations violative of Title VII and the United States Constitution. These examinations were the same examinations previously challenged in Guardians I.

THE APPLICANT POOL

The examinations* for police officer were prepared and administered during the period 1968-70 and resulting lists ranking candidates eligible for appointment were promulgated prior to May, 1970, except for 0013, promulgated March 5, 1971. (Exhibit F). Hiring began from examination 7065, 8046 and 8108 before the hiring freeze imposed on the Police Department from February 8, 1970 - January 29, 1973. The lists of 27,000 eligibles from all these examinations survived the freeze and were the pool of eligibles for

*Examinations No. 7065 (1968), 8046 (1968), 8108 (1968), 9019 (1969), 9049 (1969), 9080 (1969) and 0013 (1970).

hiring commencing in January 1973. While there was some effort to follow rank order to fill the ranks of the Department following the hiring freeze, appointments were primarily made from all these existing eligible lists in order of the candidate's completion of pre-employment processing until the lists were exhausted. (Exhibit OO).

During this post-freeze hiring period, 4733 persons accepted date of hire seniority with the Police Department, of which 23% were minority. Minority males, however, constitute only 18.7% of the relevant labor force of male high school graduates aged 20-29 in the New York Standard Metropolitan Statistical Area*, the area from which the police department attracts applicants (Exhibit I, sec. 9). Based upon these statistics, defendants moved to dismiss for failure to make out a prima facie case. After the Court's decision of March 17, 1977, defendants urged the District Court to reconsider its finding on plaintiffs' prima facie showing in light of this Court's decision in Equal Employment Opportunity Commission v. Local 14, et al. Dkts. 76-6150-6166 slip op. p. 2481. The Court denied defendants' motion to reargue. Plaintiffs who had accepted such appointments following the freeze did not file charges with the EEOC contesting their date of hire seniority. In fact, only the Guardians Association filed charges in May,1975 with the EEOC at the time of the lay-offs contesting their

*New York City, Suffolk, Nassau, Westchester, Orange and Rockland Counties.

impact on black officers. No black officers filed charges. The two individual plaintiffs, Santos and Perez, who filed charges are Hispanic.

At trial, plaintiffs introduced the Rand Study of the candidate population of Examination Nos. 8046 (1968) and 0013 (1970) which found that blacks and hispanics failed the two entry-level examinations to a greater extent than whites, and that the distribution of scores among those minority candidates who passed tended to cluster in the middle and lower ranges of scores. Additionally, Rand observed that the similarities in distribution of scores for these two exams suggested that other examinations given in New York between 1968 and 1970 would, if analyzed, produce the same general patterns. Bernard Cohen, Ph.D., who supervised the study testified in support of its conclusions.

Defendants challenged the findings of the Rand Report through the testimony of Alan L. Gross, Ph.D., statistician and psychologist, who testified that the conclusions of the Rand Study were based upon unsupported assumptions and flabby data and did not demonstrate that minorities failed those examinations in greater numbers than did non-minority applicants. The major shortcomings of the Study were (a) self-selection of the test taking group precluded a random sample; (b) Candidate ethnicity data was available for only approximately 30% of the candidates from a non-random sample and, would, therefore, have to be estimated for the remaining 70% (T. 580-82).

To estimate ethnicity a questionnaire, telephone survey, surname match and census analysis were employed by Rand. Dr. Gross found that these procedures suffered from infirmities of self-identification, differing response rate and extrapolation error which precluded solid conclusions (T 587). Moreover, Dr. Gross indicated that without evidence of examination and candidate population similarity there was no basis for the inference conclude that minority performance on other police examinations would be the same as that on 8046 and 0013 (T 604).

The Examinations for Police Officer

The prerequisites for appointment as a police officer consists of a competitive written test, a qualifying physical test, a qualifying medical examination and a background investigation. (Exhibits J-Q). From each examination, lists are prepared of those who have passed and are eligible for appointment based upon examination score and veteran's credit. Civil Service Law §50(6), 61. To be appointed, however, individuals must also establish satisfaction of pre-requisites, e.g. high school diploma, age 21, residency, United States citizenship, possession of a driver's license and good moral character. (Exhibits J-Q).

The examinations for police officer were prepared by the New York City Department of Personnel and are designed to determine whether the candidate possesses the skills, knowledge and abilities necessary to satisfactorily complete the Police Academy curriculum and the probationary training period. (T 345).

Generally, the examinations test reading comprehension, vocabulary, at approximately an eighth ninth grade reading level, (Exhibit BB) judgment in police situations and basic mathematics (T. 345). On two examinations, questions on New York City information were also included (Exhibits N, P). The most recent examination for police officer, No. 3014 prepared by Psychological Corporation a professional testing organization, similarly covered the same content area (Exhibit V). The testimony of Dr. David Hall was that content valid examinations need cover only a representative sampling of the performance domain and that there is no psychometric requirement that each examination include an identical percentage of similar questions. (T827-30). Dr. Hall, Captain Thomas Lawlor, Commanding Officer of the Police Academy and Sol Wiener, Director of Examinations, Department of Personnel all testified that these content areas reflect the course of study at the Academy and the training program during the probationary period. (T 691, 738, 739, 345). Minorities fared worse on examination No. 3014 than did whites although 79% of all applicants passed. (Exhibit 38).

Upon appointment to the Police Department, a recruit commences a one year probationary term which includes a six-month course of study at the Academy. Upon completion of this program, recruits, while still assigned to the Academy, commence field intern programs where the theories they have learned at the Academy are

tested in practical street situations. The final four months of the probationary period are spent in field training at a precinct under the supervision of a superior officer (T. 658). Upon satisfactory completion of this period of curriculum and field training, a recruit, in the discretion of the Police Commissioner, becomes a Police Officer. (Rules and Regulations of the Civil Service Commission, Rule 5.2.1). Recruits who fail the course of study at the Police Academy, are terminated from employment by the Police Commissioner (T. 658). (Rules and Regulations of the Civil Service Commission, Regulation E 24.3). The retention rate at the Academy is 88.6% for blacks, 93.2% for whites and 89.7% for hispanics (Defendants' Exhibit LL). Of those police officers who successfully complete the academic training, virtually none are terminated during the intern program, so that completion of the course at the Academy is critical to a recruit becoming a police officer. (T. 718). (Exhibits II and JJ).

The course of study at the Police Academy consists of law, police science and social science (T 665). It has been upgraded by the Department and now entitles the successful recruit to 35 college credits (Exhibit KK). An individual who does not possess basic reading, writing and judgment skills will not be able to comprehend the law of arrest (law) or master the subleties of effective crisis intervention (Social Service) which functions comprise critical aspects of the police officer's job. As noted by Captain Lawlor,

who has trained thousands of recruits, verbal skills, especially reading ability, is the factor most closely correlated to success at the Police Academy (T 665-689). He testified that the curriculum was based upon the description of duties provided by field commanders throughout the Department (T607-675).

With respect to plaintiffs' claim that the examinations tested for information or skills which would be taught at the Police Academy, Captain Lawlor testified that the program at the Police Academy required a more sophisticated application of the basic skills tested for on the entry level exams. Recruits are of course not taught how to read or write or compute simple mathematical operations. A basic vocabulary level and at least minimal judgment skill must be possessed by the recruit to enable him to master a comprehensive curriculum. (Exhibits II, JJ).

A correlation study was undertaken to compare scores achieved by all recruits passing through the Police Academy since January, 1973 on entry level examinations with their final academic averages at the Academy. (Defendants' Exhibit NN). The study conducted by William Weichum, Ph.D., a researcher with the Office of Testing and Evaluation, New York City Board of Education, was a 100% sample of over 4,000 subjects who had taken ten police officer examinations from which appointments were made to the Police Department following the freeze. The study consisted of a percentage comparison and a correlation study.

(T. 834). The percentage comparison consistently demonstrated that the largest percentage of recruits achieving good performance (80% and above) at the Police Academy scored at the highest interval (between 90-100) on the entrance exam and that the finding held true irrespective of the recruits' race (Defendants' Exhibit NN, p. 3 and Percentage Tables 1a, 1b, and 1c). A total comparison of all scores was also performed, and the correlations between entrance examination and academic achievement for all ethnic groups were found to be essentially the same. (ibid. p. 5).

The Weichum study was modeled after a similar study conducted for the Washington D.C. Metropolitan P.D. (Futransky, 1967), which study was reviewed by the Supreme Court in Washington v. Davis, 426 U.S. 229 (1976). The Futransky study involved only 361 subjects (no hispanics); here, over 4,000 subjects were studied and the resulting predictive validity correlations of .67 and .86 were strikingly similar. (ibid p. 4-5).

While the defendants did not submit a document entitled "job analysis", the process of job analysis was nevertheless undertaken by defendants in preparing the police officer examinations. The opinions of subject matter experts on site observations, and source materials such as the Patrol Guide, a comprehensive statement of police operations, duties and responsibilities, were utilized to develop the description of police officer

duties and to isolate the necessary skills, knowledge and abilities needed for successful training as a police recruit. (T 345). These same source materials form a major portion of the police science curriculum at the Academy (T 669-70). Additionally, commentary between the Police Department and the Department of Personnel regarding the caliber of recruits entering the academy indicated that the examinations were in fact selecting good candidates for police work (T 363, 430-1). Mr. Wiener testified that job analysis consisted of on-site visits and observations of police operations not for each and every exam, but selectively, since the Department of Personnel was preparing Police Officer examinations on so frequent a basis in 1968-70 as to obviate, in each instance, needless repetition of steps to determine the nature of police duties (T 437, 439-42).

Plaintiffs' expert Richard S. Barrett testified that there was no evidence that examinations were valid, that is, there was no document entitled "job analysis" which could be the basis for professional opinion as to validity (T-933).

With respect to the content areas tested on examination number 3014, i.e. reading comprehension, vocabulary, arithmetic ability and judgment in police situations, the plaintiffs' witness did not know whether or not such knowledge, skills and abilities were required

for the job of police officer because he had no knowledge of the content of the job. (T. 933).

Dr. Barrett recognized that content validity was a professionally accepted method of validating an examination, and conceded that he could identify only one city in the United States where criterion-related validity was used. He acknowledged that he had testified in 54 or 55 cases* and had found all tests to be invalid except a test for a manual job. He could not recall any non-manual job for which he had found the test acceptable to him (T. 939).

In fact, Dr. Barrett, submitted affidavits against the validity of Test No. 21, used for selection of police officers for the Metropolitan Police Department, Washington, D.C. (T. 940). See Davis v. Washington, 426 U.S. 229 (1976).

Even the Phase I Report for Examination 3014 prepared after six months of study by the Psychological Corporation did not meet Dr. Barrett's standards for detailed statements of job duties. (T 967). Plaintiffs do not challenge that examination although there are minority officers on the preferred list from that examination.

*The amicus brief of American Society for Personnel Administration submitted in Washington v. Davis in support of its contention that courts were making decisions in the area of test development without receiving robust colloquy on all relevant views, noted that in many, if not most, of the testing cases the evidence was presented by the same witness (Richard S. Barrett).

Efforts by Defendants To Improve Minority Representation in the Police Department

Captain Henry Cettina, the Commanding Officer of the Police Department's Equal Employment Opportunity Office, testified that affirmative action was undertaken by the Department to improve minority representation (T. 273-79). He also introduced the Department's Equal Employment Opportunity Program (Exhibit I), which includes descriptions of five programs carried out by the Department prior to 1973. (See Exhibit I, Part II, Chapter 9). These programs included the creation of a recruitment squad within the Department's Personnel Bureau in 1967. The functions of that squad were: (i) to attract minority candidates into the police service, and (ii) to make a determined effort to retain the interest of minorities who had passed examinations and were awaiting appointment. (Exhibit I, page 9.1). Although the hiring freeze from February 1970 to January 1973 frustrated the efforts of this unit, it was successful after the freeze in retrieving 250 minority candidates from the seven eligible lists still in existence (as concurred in by plaintiffs' witness, Guardian President Sheffey, T. 158). These candidates had withdrawn or had been dropped from processing because of a determination that they were uncooperative. (Exhibit I, page 9.1; Cettina Affidavit, para. 12; and T. 305-09). Other pre-1973 efforts included participation in a nine-month Rand Institute Study (1968-9) of minority recruitment

in the Police Department (Many of the study's recommendations were later adopted and made part of the department's minority recruitment effort.) (Cettina Affidavit, para. 14); a federally funded (Model Cities Administration) "Community Service Offices" program employing almost 1,000 persons (virtually 100% minority) in quasi-police positions for the purpose of absorbing these employees into the police officer ranks (Cettina Affidavit, para. 15; Exhibit I, page 9.1A; and T. 273); and a cadet program begun in in 1966 paying minority youths salaries during training at the Police Academy for careers in law enforcement, including the Police Department (Exhibit I page 9.1A and T. 274). This latter program, which still continues today, produced 400 eligibles who were sworn as police officers (Exhibit I, p. 9.1A).

In 1973, the Police Department and the Department of Personnel launched a massive minority recruitment program preparatory to Examination No. 3014. Donald F. Cawley, upon assuming duties as a Police Commissioner in April, 1973, had devised a Master Plan identifying minority recruitment as one of the department's top priorities (T. 236 and Exhibit G). Adopting some of the recommendations made in a 1971 report of a Rand Institute study on minority recruitment (Exhibit F), planning for the recruitment program began in July 1973 (T. 243). Deputy Inspector McNulty introduced the report of the Minority Recruitment Program (Exhibit H) and estimated that the cost of the

program in actual out-of-pocket expenses and donated services was about one million dollars (T. 245-6). Inspector McNulty testified as to the results of the recruitment effort: 53,000 persons took the examination of which 31 percent of the test-takers were Blacks and 17 percent Hispanic. (T 247). Special Certification by-passing list order was introduced for examination No. 3014 to allow candidates with Spanish language capability to be appointed on a priority basis.

As a follow-up to the 1973 minority recruitment campaign, the Affirmative Action Section of the Equal Opportunity Unit of the New York City Police Department, made application for and received a $103,600.00 grant from the Law Enforcement Assistance Administration to support a program for insuring the retention of those minority candidates (male and female) who were successful on the written phase of the December 15, 1973 examination for police officer.

In 1973 and 1974, the Police Department, having exhausted its police officer eligible lists and recognizing that the existing eligible lists from the City Transit Authority Police and Housing Authority Police contained large numbers of minority candidates, broke its traditional practice of making appointments to its ranks only from its own eligible lists. With the necessary approval of the Department of Personnel, the Police Department began to make appointments from the Transit and Housing Authority Police Officer eligible list, and from December 1973 to

June 1974, a total of 781 appointments were made of which 208 (26.7%) were minority (141 or 18.1% were Black, and 67, or 8.6% were Hispanic) (Defendants' Exhibit I, Part II, Chap. 9).

On the issue of good faith, the plaintiffs produced several witnesses from the Guardians Association and Hispanic Society who testified that the affirmative action programs to increase the number of minority persons in the Police Department were undertaken too late and not precisely in the manner they would have chosen. They acknowledged that the efforts outlined in the Department's Equal Employment Opportunity Program were put into operation by the Department and that they were involved in those Department programs. (T. 1220-1256).

For instance, plaintiffs' witness, Lieutenant Thomas Alloway, testified that he was in charge of the retrieval unit from March 1971 - November 1972, whose sole function was retrieval of minority candidates who had dropped from the employment process (No similar effort was undertaken for white candidates) (T. 1223-4).

Lieutenant Alloway testified that he left the retrieval unit in frustration because the freeze precluded hiring of the people whom he was encouraging to remain interested. He testified also that he wanted to pursue recuitment at black colleges even though by his own statements the recruited people could not be hired immediately.

Commissioner Benjamin Ward's testimony was critical of the policies of defendants in three major areas: (i) Background investigation; (ii) recruitment and (iii) testing. He was Deputy Commissioner of Community Affairs under Patrick V. Murphy from 1970 to April, 1973. The background investigation procedure was modified in 1972 and, in any event, a Rand Institute Study, 1968-69 (Exhibit F) concluded that background investigations did not have a disparate impact on minorities. The examinations were discriminatory in Ward's view solely because minorities failed them.

Commissioner Ward had no knowledge of any efforts by the defendants to improve minority representation after he left the Department in April, 1973 (T. 1205).

Former Police Commissioner Patrick V. Murphy, testified on behalf of plaintiffs. The probative value of his testimony must be measured in the following context: (i) During virtually his entire tenure as Commissioner, from October, 1970 through May, 1973, a job freeze was in existence which prevented new hiring of police officers; (ii) he was absent from New York City from 1963, when he left active service with the Police Department, until October 1970 when he returned as Commissioner, and he again left New York City immediately upon resigning his position in May, 1973, (iii) his position is that during his tenure, the Police Department, at least, did as much

as possible under the circumstances to improve minority representation; (iv) he readily concedes that he is neither a personnel expert nor a testing expert; and (v) as Police Commissioner during the previous lawsuit brought by these same plaintiffs (Guardians I), he was a defendant in that action and submitted an affidavit in opposition to plaintiffs' motion for a preliminary injunction (Exhibit OO).

Commissioner Murphy testified that the examinations were job related but should be used solely to qualify candidates for appointment, not to rank them. (T 1088-1091). In requesting new police officer examinations in 1973, however, Commissioner Murphy requested a competitive not a qualifying examination (Exhibit OO).

Murphy also testified that as Commissioner in 1970 he focused on the problem of disparate minority representation in the Department.

The Height Requirement

It has long been the shared belief of the law enforcement community that the height of a police officer has an important effect on the officer's job performance. As a result of this belief, 97 percent of a large sample of the nation's police departments had some minimum height requirement in 1973, with the average minimum requirement

being 68 inches.[1] This practice was based upon studies and expert opinion in the field of police science[2] and rely upon the arguments that (i) strength is related to height;[3] (ii) male self-esteem is related to physical prowess so that ego compensation may result in unjustifiable police police attacks on citizens,[4] (iii) the visibility of taller officers is an asset in crowd control,[5] (iv) shorter officers are more likely to be assaulted.

For each of the examinations candidates were required to be 5'7" at the time of appointment. The former height requirement of 5'8" was reduced to 5'7" with the

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1. Terry Eisenberg, Deborah Ann Kent and Charles R. Wall, Police Personnel Practices in State and Local Governments, International Association of Chiefs of Police et al., Washington, D.C. 1973.

2. Police Officer Height and Selected Aspects of Performance, Police Foundation and International Association of Chiefs of Police, Washington, 1975.

3. Human Engineering Guide to Equipment Design, edited by Clifford T. Morgan, McGraw-Hill Book Company, New York, 1963, p. 557, as cited by Raymond L. Hoobler and J.A. McQueeney, "A Question of Height," Police Chief, November 1973, p. 48.

4. E.E. Gunderson, Ph.D., "Body Size, Self-Evaluation, and Military Effectiveness," Journal of Personality and Social Psychology, 1965, Vol. 2, No. 6, pp. 902-906, as cited by Hoobler and McQueeney, p. 48.

5. Frank M. Verducci, Ph.D., "Height and Weight Requirements for Police Officers," submitted to the Civil Service Commission, City and County of San Francisco, 1974, p. 15 and p. 40.

expectation that this would increase the number of qualified Puerto Ricans (Defendants' Exhibit F, p. xxi).* The plaintiffs introduced studies to demonstrate that male Hispanics at every age are shorter than Black and White males. Thus, they contend, any height requirement has a discriminatory impact on Hispanics and that such a requirement is not related to job performance.

In March 1973, the Justice Department issued guidelines which for the first time required police departments receiving federal funds to demonstrate by empirical data the need for minimum height requirements. 38 Federal Register 4-3 (No. 46, March 9, 1973).

Upon notice of this new requirement the Police Department investigated the height requirement for police officer. Ingrid S. Baladay, of the department's Personnel Bureau, reviewed a number of studies of police height requirements throughout the United States (T213) (Lavan Report, Plaintiffs' Exhibit 20) and concluded that divergent opinion on the necessity of the requirement indicated that the Department should eliminate the height requirement prospectivly for the 1973 examination and conduct its own study to demonstrate the correlation between height and job performance (T. 212). In its job analysis of the police officer position for examination 3014, Psychological

*Defendants do not challenge plaintifs prima facie showing on the impact of the height requirement on Hispanics.

Corporation also recommended that the height requirement be eliminated so that a pool of short officers would be available for purposes of a validation study. (Defendants' Exhibit R). There was no finding, however, by Psychological Corporation or by Miss Balady, that height was, in fact, unrelated to performance.

Rather these studies reviewed by Miss Balady revealed that there was evidence of a relationship between height and assaults upon officers, and that shorter officers received more civilian complaints and had a higher rate of police equipment accident. (Exhibit E, Memo of July 12, 1974). A research design was developed by Ms. Balady which paired two groups of officers whose background, assignments, age, health, etc. were closely matched so that the height was the only variable. (Defendants' Exhibit E). The design was completed in February 1975 but because of the lay-offs of officers appointed from examination 3014 there was no pool of shorter officers for the study, and it was discontinued.

Opinion Below

The District Court found that the specific harm here is not the decision to hire or not to hire based on the results of these pre-1973 examinations, but rather the decision to lay-off police officers. The seniority system is conceded by all to be non-discriminatory. It was, therefore, the pre-1972 entry level examinations which

constitute the alleged discriminatory practice. In rejecting defendants' contention that post-Act hiring discrimination is an essential Title VII jurisdictional pre-requisite, the District Court recognized that Acha v. Beame, 531 F 2d 648 (2d Cir. 1976), did not specifically deal with that contention but nonetheless held that it was impliedly rejected there. While Franks v. Bowman, 424 U.S. 747 (1976), had not been decided when this Court decided Acha, the District Court here had the benefit of and was urged to consider Franks. The Court made no mention of it in its opinion.

Having found a jurisdictional predicate for Title VII, the District Court in its opinion proceeded to the merits of the action. The Court held that the plaintiffs had sustained their burden of establishing that the examinations had a disparate impact on minorities based on the Rand analysis of distribution by race of civil service scores on two entry level examinations. The Court gave no weight to defendants' contention that the percentage of minorities hired following the Act is equivalent to the percentage of minorities in relevant applicant pool. The Court observed that, even if minorities were under represented, that fact would have little relevance since the Title VII claim raised in the case was that utilization of these examinations has had the effect of significantly decreasing what might otherwise be the number of minority applicants who would be eligible for appointment. On a motion

to reargue, the Court summarily held that the decision in Equal Employment Opportunity Commission v. Local 14, etc, Dkt 76-6150 had no bearing on the question of plaintiffs prima facie showing under Title VII.

On the issue of job relatedness the Court held that the defendants had failed to meet their heavy burden. He concluded that a predictive-validity study comparable to the study utilized in Washington v. Davis (correlating scores on the entry examinations with performance at the Police Academy and during the six months training period) did not meet Title VII standards because it was not related to job performance after the probationary period.

The Court accepted the testimony of Richard S. Barrett, Ph.D. that since there was no written job analysis there was no evidence of content validity. It also rejected the argument of content comparability for the earlier examinations and examination no. 3014.

On the height requirement, the Court found that defendants had made efforts to empirically validate the height requirement on the first examination given after Title VII. There is no evaluation in the opinion of the research base supporting the use of a height requirement prior to 1972.

POINT I

PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION UNDER TITLE VII. FRANKS V. BOWMAN TRANSPORTATION CO., 424 U.S. 747 (1976), REQUIRES A DISCRIMINATORY POST ACT REFUSAL TO HIRE A CHALLENGE A BONA FIDE SENIORITY SYSTEM UNDER TITLE VII. HERE THE CHALLENGED EXAMINATIONS WERE GIVEN IN 1968-1970, THE LAST EXAMINATION MORE THAN TWO YEARS PRIOR TO THE DATE TITLE VII WAS MADE APPLICABLE TO GOVERNMENTAL ENTITIES.

(1)

The 1972 amendments to Title VII, Publ. L. No. 92-261, §2(1) (amended Title VII §701(a), 42 USC §2000e(a)), modified the definition of "person" under the Act to include "governments, governmental agencies, and political subdivisions". The expansion of the statute to include governmental entities, however, is prospective only. Monell v. Department of Social Service of City of New York, 532 F. 2d 259 (2d Cir., 1976).

In Acha v. Beame, 401 F. Supp. 816 (S.D.N.Y. 1975), revd. 531 F. 2d 648 (2d Dept., 1976) the District Court reviewed a challenge to the neutral date of hire seniority system involved here and held that it came within the bona fide seniority system exception of 703(h) of Title VII. On appeal this Court concluded that the relief sought by plaintiffs would prevent the perpetuation of past discrimination and was not precluded by 703(h). The question left open by this Court in Acha and answered in Franks v. Bowman, 424 U.S. 747 (1976) was the accrual date of a cause of action under Title VII. In Franks the Supreme Court, after reviewing the legislative history of

703(h), held that the discriminatory practice must occur after the effective date of Title VII and that only persons discriminatorily denied employment after the effective date of Title VII may be awarded retroactive seniority within an otherwise neutral, bona fide seniority system. The Court stated (424 U.S. 758)

> "The underlying legal wrong affecting them is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask for modification or elimination of the existing seniority system but only for an award of the seniority status they would have individually enjoyed under the present system but for the illegally discriminatory refusal to hire. It is this context that must shape our determination as to the meaning and effect of §703(h)."

See Waters v. Wisconsin Steelworkers of Int. Harvester Co., 502 F. 2d 1309, 1320 (7th Cir., 1974), cert. den. 44 U.S.L.W. 3670, May 25, 1976. Note, Retroactive Seniority as a Remedy for Past Discrimination: Franks v. Bowman, 51 St. Johns Law Review, Fall 1976, No. 1.

In the instant case, it is undisputed that there was no post-act hiring discrimination. In fact, the District Court so found (Opin., p.12). Moreover, in its opinion, the District Court held that the examinations prepared in 1968-70 meet the pre-Act constitutional standard.

In Acha this Court held that the seniority system could not be considered bona fide under §703(h) because it represented a continuation of past intentionally discriminatory practices. 531 F 2d at 655 (emphasis supplied). In so holding, this Court relied in large measure upon the holding in Local 189, United Papermakers and Paperworkers v. United States, 416 F 2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919, which had held that the §703(h) exception for bona fide seniority systems exists only where different conditions of employment "are not the result of an intention to discriminate because of race" 416 F. 2d at 995 (emph original).

We submit that Franks precludes the Local 189 analysis of jurisdiction under Title VII because it is the discriminatory post-act hiring and not the neutral lay-off system which provides Title VII jurisdiction. Since Title VII does not have retroactive applicability, Monell supra, the Title VII validation standard does not apply to these pre-1972 examinations any more than it did to the contemporaneous examinations in Washington v. Davis, 426 US 229 (1976). These examinations can only be tested against the constitutional standard and they clearly meet that standard. However, even were this Court to follow Local 189 notwithstanding Franks, there is nonetheless no predicate for Title VII jurisdiction here, because as held below and as supported by Washington v. Davis, 426 U.S. 229 (1976) there is no intentional discrimination

involved in the use of these examinations.

The cases cited by the District Court here in support of its holding that post-Act effects of pre-Act discrimination constitute a Title VII jurisdictional predicate do not support that position. In Griggs v. Duke Power Company, 401 US 424 (1971) the Court found impermissible post-Act use of discriminatory and nonjob-related aptitude tests for the employee selection; in Local 53 of Int'l. Ass'n. of Heat and Frost Insulation and Asbestos Workers v. Volger, 407 F. 2d 1047 (5th Cir. 1969), discriminatory referrals and admission policies for membership occurred both prior to and after the effective date of the Act. (407 F2d at 1050.) In fact, the Circuit Court in Local 53 specified that present discriminatory policies, not effects, were being enjoined in distinguishing the case from U.S. v. Sheet Metal Worker's Int'l. Ass'n., 280 F. Supp. 719 (E.D. Mo. 1972) where a referral seniority system was upheld because there was no evidence of post-Act discriminatory practices.

In Cates v. Trans World Airlines ____F. Supp. ____ Civ. No. 73-5487 (S.D.N.Y., July 22, 1976), intentional discriminatory refusal to hire blacks as stated in the complaint was deemed true by the Court for purpose of a motion to dismiss, as was the case in Acha. Moreover, the lay-offs themselves in Cates involved the discriminatory post-Act application of a no-marriage policy to women only.

Melanie v. Board of Higher Education of the City of New York, 12 E.P.D. ¶11,068 (S.D.N.Y. 1976), decided before Franks, holds that "allegations of discriminatory activities prior to the effective date are insufficient to form the basis for a claim of unlawful acts under Title VII against government agencies." In elaborating on the doctrine of continuing violation, Judge Gagliardi made the comments referred to in the opinion below. (Opin. p.15) There is no finding here however, of continuing discriminatory violations. Rather there is a finding that past employment practices were not intentionally discriminatory. That difference we submit, under Franks forecloses Title VII jurisdiction here.

(2)

Assuming arguendo that plaintiffs have stated a cause of action under Title VII the appropriate standard of review is found in Washington v. Davis, supra, because governmental employee selection procedures are not subject to the Title VII effect standard. This precise issue is now before the United Supreme Court in *Hazlewood School District, et al v. United States of America 534 F. 2d 805 (8th Cir. 1976), cert. gr. Docket No. 76-255, 45 U.S.L.W. 3463, Jan. 11, 1977.

Congress in enacting the amendments to the Civil Rights Act to cover municipal employees and provide an alternative administrative remedy to existing prohibitions

*Case scheduled to be heard during the April term.

under the Civil Rights Act of 1871, 42 U.S.C§1983, relied upon the Fourteenth Amendment. 2 U.S. Code Cong. & Admin. News, 1972 p. 2154. We believe that Congress in enacting these Title VII amendments meant to incorporate the constitutional standard for discrimination because it cited to Shelly v. Kraemer, 334 U.S. 1 (1974) (governmental enforcement of an intentionally discriminatory agreements explicting excluding Negroes) and Burlington v. Wilmington Parking Authority, et al., 335 U.S. 715 (1961) (government owned and publicly financed facility refusing services to Negroes because of race) for the proposition that job discrimination violates the Fourteenth Amendment and is prohitited (ibid. 2153). These citations reveal the intent of Congress to continue the traditional Equal Protection standard for discrimination in actions under Title VII against governmental entities while making the full range of Title VII remedies available where violations are found.

In General Electric Company v. Gilbert, __U.S.__, 45 U.S.L.W. 4031 (1976), the Supreme Court observed that the long standing meaning of discrimination as evolved from judicial interpretations construing the Equal Protection Clause is the appropriate starting point in interpreting "discrimination" under Title VII. The Court did note that a prima facie case of discrimination could be established even absent proof of intent, where the consequences of a test are "invidiously to discriminate on the basis of racial or other impermissible classification"

citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). But, a prima facie showing is not invidious discrimination under Griggs, nor under Washington v. Davis. Moreover, because Griggs, involved a private employer the citation to it in General Electric Co. does not completely resolve the issue.

More to the point is the line of cases construing the scope and effect of Section 5 of the Fourteenth Amendment. Since Ex parte Commonwealth of Virginia 100 U.S. 339, 345 (1880), the Supreme Court has held that Congress, under that provision, can enforce the prohibitions of the Equal Protection Clause whenever they are disregarded by a branch of government and the mode of enforcement is left to its discretion.

> "As broad as the congressional enforcement power it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce' the provisions of the amendments and may do so only by "appropriate legislation." Oregon v. Mitchell, 400 U.S. 112, 128 (1970).

Judicial interpretation of the Equal Protection standard was characterized as unnecessary to resolution of the issue of Oregon, and yet that standard was in fact the foundation of the Courts' analysis (See Harlan Dissent, 400 U.S. at 200-209).

While an earlier case described congressional power under §5 as not limited to situations of actual state law violations of the amendment, the Court perceived a basis for Congress' judgment that New York's English literary requirement constituted invidious discrimination against Puerto Ricans in violation of the Equal Protection Clause. Katzenbach v. Morgan, 384 U.S. 641, 656 (1966) Thus, the traditional Equal Protection standard has in actuality been applied to Congressional legislation under Section 5 of the Fourteenth Amendment.

Pertinent to this analysis is the decision of the Supreme Court in National League of Cities v. Usery, __US__, 44 U.S.L.W. 4794 (1976), which held that our federal system of government imposes definite limits upon the authority of Congress to regulate activities of the States as States by means of the Commerce Clause and that the Tenth Amendment secures to the States freedom to structure integral operations in areas of traditional governmental functions.

A similar limitation is placed on Congressional authority under Section 5 of the Fourteenth Amendment. Congress may only "enforce" the provisions of the Amendment and may do so only by appropriate legislation. Oregon v. Mitchell.

Here since the source of Congressional authority is the Equal Protection Clause of the Fourteenth Amendment and the legislative history of Title VII is founded upon

traditional Equal Protection analysis, the most recent judicial interpretation of the constitutional standard to be employed in a discrimination claim must obtain in a Title VII action. That interpretation requires a showing of intentional discrimination to sustain a charge of discrimination against a governmental entity. Washington v. Davis, supra.

POINT II

PLAINTIFFS' FAILURE TO FILE TIMELY CHARGES WITH THE EEOC AND LACHES BAR RELIEF UNDER TITLE VII.

Section 2000e-5(3) of Title VII requires that charges of discrimination be filed with the EEOC within 180 days after the alleged unlawful employment practice occurred. Satisfaction of this requirement is a Title VII jurisdictional prerequisite. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973).

The chronology of pertinent events here demonstrates plaintiffs failure to satisfy timely the filing requirements under the Act. The challenged examinations were administered between 1968 and 1970 and certified lists were promulgated by May, 1971. Appointments from the lists began in 1968 (No. 7065 and 8046, 8108) and were completed on October 7, 1974. The Guardian Association filed a charged with the EEOC on behalf of black laid-off officers in May, 1975. No black plaintiff filed a charge with the EEOC. Perez (challenging height) and Santos (challenging examinations) filed individually as Hispanics and the Hispanic Society filed on behalf of Hispanics. The layoffs took place on June 30, 1975 and plaintiffs commenced this action on May 3, 1976, prior to the receipt of any right to sue letter.

In Cates v. TWA, supra ___F. Supp. ___ Dkt. No.

73-5487, July 22, 1976, the District Court relied upon Collins v. United Airlines, Inc., 514 F 2d 594 (9th Cir. 1975) and Evans v. United Airlines, 534 F2d 1247 (7th Cir. 1976) to support its holding that with regard to a last-hired, first fired layoff, the layoff date is the date from which the filing period starts to run. The reliance is misplaced, however, because in both Collins and Evans the layoffs were discriminatory practices enforcing a non-job related no marriage policy against women only. The seniority system here is racially neutral and non-discriminatory. Nor are the Cates policy reasons that the filing period commenced with layoffs persuasive. Date-of-hire seniority conclusively fixes all employee rights including vacation selection and length, transfers, longevity increments, eligibility for promotional examinations and retention rights. At the point of hire, all the elements of a cause of action for adjustment of discriminatory date-of-hire seniority have accrued. The occurrence, or non-occurrence, of layoff does not have any logical or legal bearing on the assertion of a claim to adjusted seniority. Franks v. Bowman Transportation Co.,424 U.S. 747, 757 (1976), holds the underlying legal wrong is the racially discriminatory hiring system and not the operation of a racially discriminatory seniority system. If a layoff date were the appropriate point for the filing of a charge with E.E.O.C. there would in effect be no timely filing

requirement to correct allegedly improper seniority dates since layoffs may nor occur until decades after hire. See Watkins v. U.S. Steel Workers, etc. 516 F. 2d 41 (5th Cir., 1975).

Plaintiffs are also guilty of laches and should be barred from seeking relief now. Laches consists of two elements: inexcusable delay in instituting suit and prejudice to the defendants' resulting from such delay. Alexander v. Phillips Petroleum Co., 130 F. 2d 593 (10th Cir., 1942). The existence or non-existence of laches depends on the equities and the facts of the particular case. Feldman v. Trans-East Air, Inc., 366 F. Supp. 66 (S.D.N.Y. 1973), aff'd 478 F.2d 575 (2d Cir., 1973); Afro-American Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir., 1974).

Here, plaintiffs commenced an action under 42 USC §1983 in March, 1972 alleging that all entry-level examinations for police officer discriminated against them on the basis of race. An application for a preliminary injunction was denied on the ground that the lists from these examinations would soon be exhausted. On appeal this Court affirmed the denial of preliminary injunctive relief and admonished the parties to cooperate in an effort to develop a new examination which would address the problem of comparatively low minority achievement on these examinations. Guardians Assn. of N.Y.C.P. Dept., Inc. v. Civil Serv. Comm., 490 F. 2d 400,

404, (2d Cir., 1973). The plaintiffs did not pursue the lawsuit any further, and all minority eligibles on these lists were appointed and received their seniority as of that date. Additionally, the City of New York and the Police Department undertook a hugh minority recruitment effort and contracted with a testing corporation for a six-month study and preparation of an examination consonant with EEOC Guidelines. The plaintiff associations were interviewed and consulted by the testing corporation staff as part of the study for the new examination.

Now, at least six years after the examination lists were certified and after plaintiffs have acquiesced in their date-of-hire seniority along with other police officers, the plaintiffs resurrect their stale claims. The personal and departmental dislocation involved in bumping police officers, whose service in some instances date back to 1969, for plaintiffs whose delay is neither explained nor excusable constitutes substantial prejudice to defendants. Individual police officers have made substantial commitments to the New York City Police Department while plaintiffs slept on their rights. Inexcusable delay and prejudice to defendants warrant the application of laches as a bar to these actions.

In Afro-American Patrolmen's League v. Duck, 503 F. 2d 294 (6th Cir., 1974), supra, the District Court's ruled that failure to contest promotional examination for captains and lieutenants until appointments

had been made and the list was soon to be exhausted, barred relief under principles of laches. The principles of laches should similarly be held to bar plaintiffs claims for relief herein.

POINT III

DEFENDANTS ARE ENTITLED TO JUDGMENT UNDER TITLE VII STANDARDS

(1)

The percentage of minorities hired post-act corresponds with the percentage of qualified minority eligibles in the applicant pool. The District Court erred in finding that plaintiffs had made out a prima facie showing of disparate impact.

The recent decision of this Court in Equal Employment Opportunity Commission v. Local 14, etc., DKT 76-6150 slip. opin., p. 2481 (hereafter EEOC) hold that, where the post-Act minority hiring rate corresponds to the percentage of minorities in the relevant applicant pool, there is no disparate impact and the plaintiff bears the burden of showing that the employee selection procedure is discriminatory. The decision reflects the Franks analysis that Title VII is prospective in application and is in accord with virtually all cases reviewing plaintiffs' prima facie case under Title VII. See Rodriquez v. East Texas Motor Freight, 505 F. 2d 40, 53 (5th Cir., 1974); United States v. Wood Lathers, Local 46, 471 F. 2d 408, 414 n. 11 (2d. Cir.,1973), cert. denied, 412 U.S. 939 (1973); United States

v. Chesapeake and Ohio Ry. Co., 471 F. 2d 582, 586 (4th Cir., 1972), cert. den. 411 U.S. 939 (1973); Rowe v. General Motors Corp., 457 F. 2d 348, 357 (5th Cir., 1972); United States v. St. Louis-San Francisco Ry. Co.,464 F. 2d 301, 307 (8th Cir., 1972); Carter v. Gallagher, 452 F. 2d 315 (8th Cir., 1971), modified on rehearing en banc, 452 F. 2d 327, cert. denied, 406 U.S. 950, (1972).

Qualifications for the position of police officer, not challenged in this case, include minimum age of 21 and maximum of 29 and a high school diploma or its equivalent at time of appointment. Available work force statistics prepared by the Department of Labor from 1970 census data for the Standard Metropolitan Statistical Area indicates that minorities comprise only 18.7% of the total work force between 20 and 29 years of age with 12 years of schooling. (Exhibit QQ, and I, p. 5, 2). The post-freeze minority hire rate is 23%. (Exhibit LL) Moreover, of the 2863 police officers laid off in June 1975, 616 or 21.5% were minority officers. Thus neither the post-Act hire rate nor the layoffs had a disproportionate impact on minorities.

At trial the District Court found such proof irrelevant. Even if, as defendants contend the percentage of minority police is nearly equivalent to the percentage of minorities in the relevant applicant pool, the fact remains that utilization of the examinations challenged

has had the effect of significantly decreasing what right otherwise be the number of minorities who would under N.Y.C.P.D. procedures be eligible for appointment." (Opin. p.20.)

It concluded that the relevant labor pool argument had relevance only to the issue of intent (Opin. Notes, p. 5, fn. 28). The law is to the opposite effect, however, EEOC, supra, and statistical proof of post-Act minority hiring bears heavily on the issue of plaintiffs prima facie showing and the burden of proving job-relatedness.

On the motion to reargue, even in light of EEOC, the District Court refused to consider the relevant labor pool argument, and summarily denied the motion. The District Court refusal to consider these post-Act hiring statistics was clearly erroneous.

The standard for disparate impact employed by the District Court essentially relied upon cases such as Kirkland v. Department of Correctional Services, 520 F2d 420 (2d Cir., 1975); Vulcan Society v. Civil Service Commission, 490 F. 2d 387 (2d Cir., 1973); Bridgeport Guardians Inc. v. Bridgeport Civil Service Commission, 482 F. 2d 1333 (2d Cir., 1973); Chance v. Board of Examiners, 458 F 2d 1167 (2d Cir., 1972); which require a significant and substantial discriminatory impact on minorities. to make out plaintiffs' prima facie showing.

In virtually every challenge where disparate impact has been found, complete or substantially complete

statistical data on ethnicity of test takers was available to the Court, or was confirmed by an extremely low minority ce rate.

For example, in Chance the Court relied upon 100% ethnic performance data on examinations and a 1% minority appointment rate. Vulcan involved ethnic data produced by a sight survey of all of the nearly 14,000 test takers and a subsequent sight survey of 8,000 who appeared for the physical test. For Kirkland the Court received ethnic data on all test takers and in Jones v. N.Y.C. Human Resources Administration, 391 F. Supp. 1064 (S.D.N.Y. 1975) aff'd 528 F2d 696 (2d Cir. 1976) complete statistical data on ethnicity was available for two promotional examinations and for 51-60% of test takers on three entry level competitive examinations.

Here, the District Court had only the Rand Report (Exh 1) to support its conclusion as to the sufficiency of the plaintiffs' statistical case. (Opin. p.22) The Rand study determined ethnic performance on two examinations based on known statistics for 30% of the applicants, and estimates as to the remainder. From this, the report made conclusions as to the probability of ethnic performance on five other examinations, for there was absolutely no statistical data nor proof of examination or population comparability. Moreover, the ethnic hire rate from these examinations squarely controverts, rather than confirms, Rand's conclusions.

The plaintiffs have failed to meet the intent standard or to show disparate impact. Assuming, arguendo, that the Title VII effect standard applies here and defendants are required to establish job-relatedness, defendants have clearly met that burden and the District Courts' ruling against defendant on that issue was clearly erroneous.

Since Title VII requires proof of validation efforts by an employer, a few preliminary comments on validation are appropriate. "Validity can best be defined as the degree to which a test is capable of achieving certain aims. It is sometimes defined as truthfulness--does the test measure what it purports to measure." W. Mehrens & I. Lehman, Standardized Tests in Education. 42 (1969). The purpose of validation is to insure that the selection device will choose a successful employee with significantly greater frequency than could be expected from pure chance. For both minorities and whites, there will always be high test scorers who become unsatisfactory employees and low test scorers who become satisfactory employees. The fact that individuals may perform satisfactorily on the job without obtaining the prescribed minimum scores is inherent in any process which involves the applicability of pro-

bability theory as objective employee selection techniques do. See W.L. Hays, Statistics for Psychologists, Chs. 2 & 3 (1963).

Defendants maintain that the examinations here have been validated as to content and in a criterion related validity study. We note that whereas criterion validation judges a test by the statistical study of results, content validity is established by logically examining the test and the method of its preparation, L. Cronbach, Essentials of Psychological Testing, 148 (3d ed. 1970).

"An examination has content validity if the content of the examination matches the content of the job." Vulcan I, 360 F. Supp. at 1274. No examination can test all the possible questions that might be asked, but must sample from the entire content universe. A content valid test then, is one in which the content is deemed to sample adequately the content universe. Cronbach, supra 1970, p. 145. If the content of the test bears a logical relationship to the content of the job, then performance on the test will necessarily be logically related to performance on the job. Here the examinations were prepared by the Department of Personnel drawing upon the expertise of police department subject matter experts and research materials, such as daily-used procedures and the curriculum at the Police Academy, to define the nature and duties of police office work. (T. 345). The job-relatedness

of these examinations is supported not only by the method of preparation but also by the content comparability of these examinations and examination no. 3014. That examination was prepared by Psychological Corporation after a six-month field study of the job of police officer from precinct level to headquarters, involving patrolmen, supervisors, staff personnel employee groups and the Commissioner, in low-medium and high level crime areas. (Exhibits R and W). That exhaustive effort produced a job description indentical to that employed by the Department of Personnel and an examination testing for content areas comparable to those previously tested on examinations prepared by the Department of Personnel. (T364,740) (Exhibits Q,T,U,and V).

The fact that all the examinations are not absolutely identical in content areas does not diminish their comparability in the areas of reading comprehension, vocabulary, mathematics and judgment in police situations. Cronbach, 1970. Some of the older examinations tested for ability to observe simple pattern progressions or read charts and diagrams. (Exhibits J-P). Although these are not specifically tested for in examination No. 3014, its job analysis and the testimony of Captain Lawlor indicate that the job of police officer necessarily requires skills in these areas. (T 671). While the

inclusion of New York City information* does not have a parallel in any of the earlier examinations, these questions were designed to maximize the potential for success of resident New Yorkers and are related to the community service aspect of the job of police officer as documented by the Psychological Corporation study. (Exhibit R). While such questions may be inappropriate for the position of fireman, (See Vulcan, supra) they have been shown to be part of the job of a police officer examination. (ibid).

The District Court offered no authority for its holding that percentage differences in content areas precluded content validity (Opin. p. 28,29). Moreover, the proof submitted by plaintiffs and accepted by the Court constituted an obsession with form over substance. The whole attack was to the absence of a written job analysis. There is not event scant recognition of the eminently logical notion that since the purpose of a job analysis is to obtain information about a job, testimony on the information gathering process satisfies the job relatedness requirement (ibid p. 24,25). Moreover even Dr. Barrett, who would require greater precision and detail on the job of police officer (T975-76), could not say that the perfect job analysis would not procedure these same content areas. (T926-930, 933).

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*Examination No. 9080, 9049. 0013 included questions in New York City information. (Defendants' Exhibit J-Q).

Most significantly, Commissioner Murphy, plaintiffs' witness concluded that the tests were job related. He, in fact, would continue to use them to screen candidates. (T1088-1091). Thus, the claim that the examinations are not, in fact, job-related can not be reconciled with the evidence in the case. From all factual sources the inescapable conclusion emerges that a recruit must possess these minimum skills, knowledge and abilities to succeed at the Academy and to complete the probation period. The course of study there mirrors the job and was compiled from the observations of subject matter experts throughout the Department. (T670-676 Exhibits II, JJ). Both the sliding scale test of preparation devised by Judge Weinfeld in Vulcan and the empirical fact of actual job-relatedness is demonstrated by this record.

The defendants also proved that the examinations were significantly related to an important aspect of job performance.

Under Title VII* an employer must show that an employee selection device has been "validated in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary

*29 CFR 1607.4(c) provides:

> Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question". Washington v. Davis, supra.

In Washington v. Davis the Supreme Court noted that the job-relatedness requirement for Title VII may well be satisfied by proof that an examination predicts candidate trainability.

> "This conclusion of the District Judge that training-program validation may itself be sufficient is supported by regulations of the Civil Service Commission by the opinion evidence placed before the District Judge and by the current views of the Civil Service Commissioners who were parties to the case. Nor is the conclusion foreclosed by either Griggs or Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); and it seems to us the much more sensible construction of the job relatedness requirement." 96 S. Ct. 2040 at 2053.

The Weichun study, modeled after the Futransky study in Washington v. Davis, meets that "more sensible" standard because it demonstrated that for 4,000 recruits performance on the examinations is a good predictor of performance at the academy. Significantly, the study shows that the performance correlation obtains irrespective of race (Exhibit NN). Since performance at the Academy is determinative of permanent police officer status*

*In Washington v. Davis, all recruits passed the Recruit Training School Program. Here 10% of the candidates fail and those who do are terminated from Police Service by the Police Commissioner, Civil Service Rules and Regulations, Rule 5.2.4b.

and its curriculum mirrors the job of police officer, 29 C.F.R. 1607.4(c) is entirely satisfied. Thus under Title VII defendants may utilize these examinations to select qualified candidates for police work in New York City.

POINT IV

IT WAS ERROR FOR THE COURT TO REORDER SENIORITY LISTS TO FAVOR MINORITY WITH OUT HOLDING A HEARING ON RELIEF.

Under Equal Employment Opportunity Commission v. Local 14, supra, a hearing on relief must be held by the District Court which affords the parties an opportunity inter alia, to present evidence on the impact of alternative forms of relief and practices in the affected field. The District Court did not premit proof on these matters but rather held a "hearing" to enforce a pre-determined relief. This did not comport with the decision of this Circuit in EEOC supra, or in Acha v. Beame, 531 F 2d 648 (2d Cir., 1976) and was error.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED, WITH COSTS.

April 12, 1977.

Respectfully submitted,

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Appellants.

LEONARD KOERNER,
ROSEMARY CARROLL,
PAUL L. BRENNAN,
of Counsel.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

PAUL L. BRENNAN, being duly sworn, deposes and says:

That on the 12th day of April, 1977, deponent being then over 21 years of age, served the annexed brief on Sara S. Steinboch, attorney for the plaintiff, at 1 Chase Manhattan Plaza, Borough of Manhattan, New York City by personal delivery to her of 3 copies of said brief.

Paul L. Brennan
PAUL L. BRENNAN

Sworn to before me this
12th day of April, 1977.

DONALD M. NUSSBAUM
Notary Public, State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1978

Donald M. Nussbaum